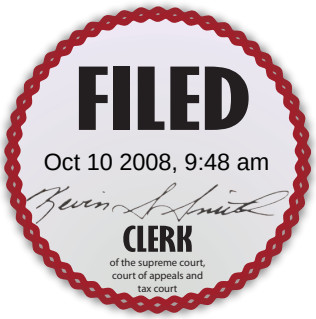

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IN THE
COURT OF APPEALS OF INDIANA

JAMES PELLO,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0803-CR-137
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0609-FA-00048

October 10, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

James Pello appeals his convictions and sentence for Class A felony child molesting, Class C felony child molesting, and Class D felony dissemination of matter harmful to minors. Specifically, he contends that the trial court erred in allowing the State to ask the twelve-year-old victim a leading question and that his sixty-one-year sentence is inappropriate. Concluding that the court did not abuse its discretion in allowing the State to ask the child victim a question that suggested the subject matter and that the maximum sentence is not inappropriate for this repeat pedophile, we affirm.

Facts and Procedural History

In 2004, K.G. was in the third grade. K.G. knew Pello since she could remember and referred to him as "Grandpa." Tr. Vol. II p. 22.[1] Pello was not, in fact, K.G.'s grandfather but rather a good friend of the family. K.G. visited Pello every other weekend. During these visits, K.G. spent the night. On many occasions, Pello made K.G. watch "[n]asty movies," that is, "grownup movie[s]" with "[u]nclothed" people doing "nasty" things. *Id.* at 26-27. While the movie was playing, Pello undressed K.G. and himself, and the two sat by each other on the couch. Pello touched K.G. at a place she identified as "where I pee" with his fingers and his "di**." *Id.* at 30, 31. Pello either got on top of K.G. or sat K.G. on his lap and then Pello placed his penis "where [K.G.] peed." *Id.* at 33. Pello also licked the same area with his tongue. *Id.* at 32. On another occasion, Pello tried to insert his penis into K.G.'s "butt." *Id.* at 29, 33. In addition,

[1] We note that Volume II of the transcript begins with page 1. Appellate Rule 28(A)(2) provides, "The pages of the Transcript shall be numbered consecutively regardless of the number of volumes the Transcript requires." In addition, we note that for unknown reasons there are two copies of each transcript.

Pello put his penis in K.G.'s mouth. *Id.* at 53. K.G. told Pello that these various activities hurt her and pulled away or resisted him. As a result, Pello either pulled K.G. back or let her go.

When K.G. was in the latter part of her third grade year, she told her mom what happened with Pello, and when she was in the fourth grade, she told the principal at her school what happened with Pello. She waited so long to tell her mother because she was afraid.

In August 2006, Pello went to the Elkhart Police Department to give a statement because of the allegations that had surfaced and met with Detective Michal Miller of the Sex Crimes Unit. The interview with Pello was videotaped. During the interview, Pello admitted to showering with K.G., "lick[ing] her privates," watching pornographic videos, K.G. putting her "mouth" on his "penis," rubbing up against K.G.'s body with his "penis," and ejaculating on at least five different occasions. State's Ex. 3 (videotape). Thereafter, the State charged Pello with Class A felony child molesting (deviate sexual conduct: oral sex),[2] Class C felony child molesting (fondling or touching),[3] and Class D felony dissemination of matter harmful to minors (pornography).[4] At Pello's December 2007 jury trial, which was nearly three years after the events, K.G. testified, and Pello's videotaped statement was played. Pello was found guilty as charged. At the sentencing hearing,[5] the trial court identified as an aggravator Pello's criminal history, which

[2] Ind. Code § 35-42-4-3(a)(1).

[3] Ind. Code § 35-42-4-3(b).

[4] Ind. Code § 35-49-3-3(1).

consists of prior felony convictions for sex offenses. As for mitigators, the court identified Pello's age of sixty-five and his poor health. Finding that the aggravator outweighed the mitigators, the court sentenced him to fifty years for the Class A felony, eight years for the Class C felony, and three years for the Class D felony. The court ordered the sentences to be served consecutively, for an aggregate sentence of sixty-one years. Pello now appeals.

Discussion and Decision

Pello raises two issues on appeal. First, he contends that the trial court erred in allowing the State to ask twelve-year-old K.G. a leading question. Second, he contends that his sixty-one-year sentence is inappropriate.

I. Leading Question

Pello contends that the trial court erred in allowing the State to ask twelve-year-old K.G. a leading question. Pello highlights the following portion of K.G.'s direct examination:

> Q [W]ould there be some other things that Grandpa Pello would have you do with his weeny?
>
> A No.
>
> Q When – was there any time when he would have you place his weeny in your mouth?
>
> [Objection from Pello as leading; response from State; trial court overrules]

[5] We note that although Pello was sentenced in January 2008, his crimes occurred in 2004, which is before the amendments to our sentencing statutes. Therefore, the presumptive sentencing scheme applies. *See Gutermuth v. State*, 868 N.E.2d 427, 431 n.4 (Ind. 2007) (noting that the sentencing statute in effect at the time a crime is committed governs the sentence for that crime).

Q K.G., in relation to your Grandfather's weeny, did he ever ask you to put it in your mouth?

A Yes.

Q And did you do that?

A Yes.

Tr. Vol. II p. 52-53.

Indiana Evidence Rule 611(c) provides, "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony." A leading question is one that suggests to the witness the answer desired. *Williams v. State*, 733 N.E.2d 919, 922 (Ind. 2000). However, the mere mention of a subject to which a witness is desired to direct his or her attention is not considered to be a suggestion of an answer. *Id.* Indiana courts have allowed leading questions for child witnesses; young, inexperienced, and frightened witnesses; special education student witnesses; or "weak-minded adult" witnesses. *Id.* We limit the use of leading questions "in order to prevent the substitution of the language of the attorney for the thoughts of the witness as to material facts in dispute." *Id.* The use of leading questions on direct examination generally rests within the trial court's discretion. *Id.*

We conclude this line of questioning was not leading. Although the State may have suggested the subject matter of K.G. performing oral sex on Pello, it did not suggest the answer to K.G. Even if the line of questioning was leading, the trial court did not abuse its discretion in allowing it. K.G. was twelve years old at the time of trial. As such, the State had more leeway when examining her.

More importantly, though, K.G.'s testimony is merely cumulative of other evidence admitted at trial. As even Pello concedes, *see* Appellant's Br. p. 9, in his videotaped statement he confesses to placing his penis in K.G.'s mouth. *See* State's Ex. 3 (videotape). As such, any error in the admission of K.G.'s testimony is harmless. *See Oldham v. State*, 779 N.E.2d 1162, 1170 (Ind. Ct. App. 2002) (stating that any error in the admission of evidence is harmless and not grounds for reversal where the evidence is merely cumulative of other evidence), *trans. denied*.

II. Sentence

Pello next contends that his sixty-one-year sentence is inappropriate in light of the nature of his offenses and his character pursuant to Indiana Appellate Rule 7(B). Appellate Rule 7(B) provides, "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." The burden is on the defendant to persuade us that his sentence is inappropriate. *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

As for the nature of the offenses, Pello forced someone who viewed him as her grandfather to view pornographic movies and engage in various sexual acts on several occasions. K.G., who was a third grader, told Pello to stop and tried to end the encounters, yet Pello was not deterred and continued the molestation at K.G.'s next visit.

As for Pello's character, the record shows he is a repeat pedophile. The trial court detailed the following convictions for Pello: a 1963 conviction in Vermont for lewd conduct with a child; 1970 convictions in Quebec, Canada, for indecent assault on a

female and indecent assault on a male; a 1974 determination in Indiana as a sexual psychopath; a 1981 conviction in Illinois for unlawful restraint; and a 1996 conviction in Indiana for welfare fraud. Sent. Tr. p. 8. In addition, Pello has four misdemeanor convictions. Tellingly, in his videotaped statement, Pello accuses K.G. of requesting to watch the pornographic videotapes and asking for both vaginal and anal intercourse; however, Pello claims to have denied K.G.'s requests on grounds that it would hurt her. *See* State's Ex. 3 (videotape). As the trial court noted, "Obviously, [Pello] is a committed pedophile, who poses a horrible risk to the children of this community so long as he is at liberty." Sent. Tr. p. 8. Although Pello was sixty-five years old and had health issues at the time of sentencing, these considerations are overshadowed by his record.

The trial court found Pello to be "one of the worst offenders" and concluded that "imposition of the maximum sentence is uniquely appropriate in his case." *Id.* We agree. Pello has failed to persuade us that his sixty-one-year sentence is inappropriate.

Affirmed.

KIRSCH, J., and CRONE, J., concur.